

Agenda

Item #2



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: October 19, 2011
Re: Proposed Update to Commission's Guidelines on Spending Maine Clean Election Act Funds

The Maine Clean Election Act (MCEA) requires candidates to spend MCEA funds on "campaign-related purposes." (21-A M.R.S.A. § 1125(6)) The statute does not define campaign-related purposes, but rather requires "the Commission [to] publish guidelines outlining permissible campaign-related expenditures." Id.

For the 2012 elections, the Commission staff recommends updating the guidelines in two respects:

- We suggest adding a section on page 2 of the guidelines to address whether MCEA candidates may discuss ballot questions in their campaign materials paid for with MCEA funds.
- We suggest some improvements to the phrasing of some of the Commission's previous advice. (Also, we have re-ordered some of the uses of MCEA funds that the Commission has previously indicated are permissible or impermissible.)

I have attached the proposed 2012 guidelines. All of the new or amended language is indicated with an arrow or a box. I have also attached the 2010 guidelines for your reference.

The ballot question issue arose at a May 2010 meeting of the Commission. Attorney Dan Billings inquired whether MCEA candidates could use their public campaign funds to pay for radio advertising that included supportive statements concerning a June 2010 people's veto referendum concerning tax reform. In case you wish to refer to the minutes of that meeting, I have attached them. (The proposed radio ad was the *first* question raised by Mr. Billings.)

The staff proposes that MCEA candidates should be able to mention their positions on ballot questions in their paid communications but should not use MCEA funds to pay for a communication that primarily supports or opposes a referendum or citizen initiative.

I should mention that in an April 2011 meeting, the Commissioners authorized the staff to include this restriction as an amendment to the Commission's 2011 legislation. The Commission's bill was already quite large and was considered by the Veterans and Legal Affairs Committee toward the end of the 2011 legislative session. When it became clear that this was not going to be a simple matter for the committee to resolve, I suggested to the committee members withdrawing this item as a proposed amendment to the Commission's bill.

This is not an issue that must be addressed further in the Commission's guidelines. Nevertheless, the staff continues to think it is a good policy, so we offer it for your consideration as part of the Commission's expenditure guidelines.

Thank you for your consideration of this memo.



2012 EXPENDITURE GUIDELINES For Maine Clean Election Act Candidates

Candidates must spend Maine Clean Election Act (MCEA) funds for campaign-related purposes and not for other purposes such as the candidate's personal benefit, party-building, or to promote another candidate's campaign.

PERMISSIBLE CAMPAIGN-RELATED EXPENDITURES

Expenditures for "campaign-related purposes" are those which are traditionally accepted as necessary to promote the election of a candidate to political office. Candidates using MCEA funds must also take into account the public nature of the funds, the underlying objectives of the MCEA, and the reasonableness of the expenditures under the circumstances. In Maine, traditional campaign expenses have included:

- Political advertising expenses
- Campaign communications such as signs, bumper stickers, T-shirts, or caps with campaign slogans, etc.
- Campaign events (e.g., invitations, food, tent or hall rental, etc.)
- Printing and mailing costs
- Office supplies
- Campaign staff expenses
- An entry fee for an event organized by a party committee, charity, or community organization or an ad in an event publication, as long as the expenditure benefits the candidate's campaign.
- Campaign travel expenses, such as fuel and tolls

PROHIBITED EXPENDITURES

Candidates may not use MCEA funds for personal expenses. This means candidates may not borrow from or use MCEA funds for personal or other non-campaign expenses, even if temporarily and with the intention of repaying the funds. Personal expenses are for goods and services that the candidate would otherwise purchase independently of the campaign, such as:

- Day-to-day household expenses and supplies
- Mortgage, rent, or utility payments for the candidate's personal residence, even if part of the residence is being used by the campaign
- Vehicle repair and maintenance
- Non-campaign transportation expenses
- Clothing, including attire for political functions such as business suits or shoes

Maine Clean Election Act funds may not be spent to:

- pay a consultant, vendor, or campaign staff for anything other than campaign goods or services
- compensate the candidate for services provided by the candidate
- make independent expenditures supporting or opposing any candidate, ballot question, or political committee
- assist in any way the campaign of any candidate other than the candidate for whom the funds were originally designated
- contribute to another candidate, a political committee, or a party committee other than in exchange for goods and services
- make a donation to a charity or a community organization, other than in exchange for campaign goods or services
- promote political or social positions or causes other than the candidate's campaign
- make a thank-you gift (including a gift card) to a volunteer or supporter
- pay civil penalties, fines, or forfeitures to the Commission, or defend the candidate in enforcement proceedings brought by the Commission
- assist the candidate in an election recount

GUIDELINES ON SELECTED ISSUES

Salary and Compensation. Candidates may use MCEA funds to pay for campaign-related services by staff or consultants, provided that compensation is made at or below fair market value and sufficient records are maintained to show what services were received. Documentation must include a description of the labor performed by the staff member or consultant, and an itemization of any goods or services purchased from other vendors including date, vendor, and amount (see "Required Record-Keeping" below).

Car Travel. MCEA campaigns may reimburse the candidate or campaign workers for their car travel, as long as the person reimbursed has kept a travel log. For 2012, the campaign may make a travel reimbursement up to the number of miles traveled as reported in the log multiplied by \$0.44. Campaigns must keep the travel logs for three years, and provide them to the Commission if requested. Candidates and their spouses or domestic partners may spend any amount of their personal funds for campaign travel without seeking reimbursement. Other individuals may spend up to \$100 of their personal funds to pay for travel without making a contribution to the campaign.

⇒ **Electronics and Other Personal Property.** Goods purchased with MCEA funds that could be converted to personal use after the campaign (e.g., computers, fax machines, and cell phones) must be sold at fair market value and the proceeds returned to the Maine Clean Election Fund no later than 42 days after the final report for the campaign. Candidates are welcome to lease electronic and other equipment.

⇒ **Ballot Question.** Candidates may state their position with respect to a ballot question in a communication financed with MCEA funds. Candidates may not use MCEA funds for a paid communication that primarily supports or opposes a referendum or citizen initiative.

Food. Candidates may spend a reasonable amount of MCEA funds on food for campaign events or to feed volunteers while they are working. Legislative candidates may not use MCEA funds to purchase food that is consumed only by the candidate and/or the candidate's spouse. Gubernatorial candidates may use MCEA funds to purchase meals for the candidate and/or the candidate's spouse if associated with travel for campaign purposes.

Lodging. Candidates may use MCEA funds to pay for lodging if necessary for campaign purposes, but must keep lodging expenses reasonable.

Campaign Training. Candidates may use MCEA funds for tuition or registration costs to receive training on campaigning or policy issues.

Post-Election Notes and Parties. Candidates may spend up to the following maximum amounts of MCEA funds on post-election parties, thank you notes, or advertising to thank supporters or voters: \$250 for State Representative candidates and \$750 for State Senate candidates. Candidates may also use personal funds for these purposes.

REQUIRED RECORD-KEEPING

The MCEA requires participating campaigns to keep bank or other account statements for the campaign account covering the duration of the campaign. For every expenditure of \$50 or more, the campaign must also keep:

- (1) an invoice from the vendor stating the particular goods or services purchased, and
- (2) a cancelled check, cash receipt, or other acceptable proof that the vendor received payment.

⇒ If the campaign pays \$500 or more during an election cycle to someone for providing campaign staff or consulting services, the campaign must keep a contemporaneous document such as an invoice, contract, timesheet, or other document specifying in detail the services provided, the amount paid and the basis for the compensation paid by the campaign. Please select a treasurer who will be responsible about keeping these records.

AUDITING AND COMPLIANCE

In 2012, the Commission staff will audit at least 20% of MCEA legislative candidates. The staff will review all receipts and expenditures disclosed by MCEA candidates in campaign finance reports. The Commission frequently requests additional information from candidates to verify that public funds were spent for campaign-related purposes. Candidates who misuse public funds may be required to repay some or all public funds received, may be liable for civil penalties, and may be referred to the State Attorney General for possible criminal prosecution.



2010 EXPENDITURE GUIDELINES For Maine Clean Election Act Candidates

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- Printing and mailing costs;
- Political advertising expenses;
- Campaign communications such as signs, bumper stickers, T-shirts, or caps with campaign slogans, etc.;
- Office supplies;
- Campaign events (e.g., food, rent of tent or hall, etc.);
- Campaign staff expenses;
- Campaign travel expenses, such as fuel and tolls; and
- An entry fee for an event organized by a party committee, charity, or community organization or an ad in an event publication, as long as the expenditure benefits the candidate's campaign.

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- Day-to-day household food items and supplies;
- Vehicle and transportation expenses unrelated to the campaign;
- Mortgage, rent, or utility payments for the candidate's personal residence, even if part of the residence is being used by the campaign; and
- Clothing, including attire for political functions such as business suits or shoes.

Maine Clean Election Act funds may not be spent to:

- make independent expenditures supporting or opposing any candidate, ballot measure, or political committee;
- assist in any way the campaign of any candidate other than the candidate for whom the funds were originally designated;
- contribute to another candidate, a political committee, or a party committee, other than in exchange for goods and services;
- pay a consultant, vendor, or campaign staff, other than in exchange for campaign goods or services;
- make a thank-you gift (including a gift card) to a volunteer or supporter;
- compensate the candidate for services provided by the candidate;
- make a donation to a charity or a community organization, other than in exchange for campaign goods or services;
- promote political or social positions or causes other than the candidate's campaign;
- pay civil penalties, fines, or forfeitures to the Commission, or defend the candidate in enforcement proceedings brought by the Commission; or
- assist the candidate in a recount of an election.

GUIDELINES ON SELECTED ISSUES

Electronics and Other Personal Property. Goods purchased with MCEA funds that could be converted to personal use after the campaign (e.g., computers, fax machines, and cellular telephones) must be reported on Schedules B and E of the candidate reporting form. No later than 42 days after the final report for the campaign, the goods must be sold at fair market value and the proceeds returned to the Maine Clean Election Fund. Candidates are welcome to lease electronic and other equipment.

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Post-Election Notes and Parties. Candidates may spend up to the following maximum amounts of MCEA funds on post-election parties, thank you notes, or advertising to thank supporters or voters: \$250 for State Representative candidates, \$750 for State Senate candidates, and \$2,500 for gubernatorial candidates. Candidates may also use personal funds for these purposes.

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- (1) an invoice from the vendor stating the particular goods or services purchased, and
- (2) a cancelled check, cash receipt, or other acceptable proof that the vendor received payment.

For any services provided to the campaign by a vendor for which the campaign paid \$500 or more for the election cycle, the campaign must keep an invoice, timesheet, or other document specifying in detail the services the vendor provided, the amount paid and the basis for the compensation paid by the campaign. Please select a treasurer who will be responsible about keeping these records.

AUDITING AND COMPLIANCE

In 2010, the Commission staff will audit all gubernatorial candidates receiving MCEA funding and at least 20% of MCEA legislative candidates. The staff will review all receipts and expenditures disclosed by MCEA candidates in campaign finance reports. The Commission frequently requests additional information from candidates to verify that public funds were spent for campaign-related purposes. Candidates who misuse public funds may be required to repay some or all public funds received, may be liable for civil penalties, and may be referred to the State Attorney General for possible criminal prosecution.



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Minutes of the May 27, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the April 29, 2010 Meeting

Mr. Youngblood moved to accept the minutes of the April 29, 2010 meeting as drafted. Ms. Matheson seconded the motion.

The motion passed unanimously (4-0).

Agenda Item #2. Endorsements - Request for Advice by Rep. Thomas Saviello

Mr. Wayne explained that Rep. Thomas Saviello of Wilton, a Republican candidate for State Senate District 18, wishes to endorse three Republican House candidates in his area. Those candidates may be interested in sending mailings to voters in their districts citing his endorsement. His candidacy for State Senate would not be mentioned and he would be referred to as Rep. Tom Saviello in the mailings. In Rep. Saviello's view, these mailings would benefit the House candidates and not him. Mr. Wayne said this issue – when a candidate is mentioned in a public communication – has given rise to complaints in the past. The complainants contended that the candidate received an in-kind contribution by getting more name recognition as a result of the communication. Rep. Saviello asked whether the use of his endorsement in a campaign communication by another candidate would be consistent with Maine campaign finance law and whether the staff could assure him that it would not be considered an in-kind contribution. Mr. Wayne explained that it would be beneficial for candidates if the Commission had a policy on this issue. He

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of public participants regarding particular items, the following agenda items were taken out of order:

Agenda Item #8. Use of Maine Clean Election Act Funds to Discuss People's Veto Referendum

Mr. Wayne explained that Attorney Daniel I. Billings seeks advice on behalf of a number of Republican candidates. Mr. Billings has two questions: Whether candidates may spend Maine Clean Election Act funds to advocate in favor of the June 8, 2010 people's veto referendum on the tax reform bill and whether a business owned by a candidate can run ads discussing the negative effect on his business if the people's veto does not pass and remain in compliance with campaign finance law.

Daniel I. Billings, Esq. spoke on behalf of a number of Republican candidates who are interested in running ads that, as well as promoting their election, will mention the people's veto referendum. Mr. Billings said he was more comfortable getting an advisory opinion before the expenditure was made because the potential penalties for misuse of MCEA funds can be substantial. He said that there is a history of candidates tying their campaigns to referendum issues, so what is being proposed for this election is not unusual. He said the Commission's expenditure guidelines and the statute state that MCEA funds must only be spent for campaign related purposes. He said that discussing issues during an election is a campaign related purpose. He said that if the script for the radio ad that had been given to the Commission dealt with healthcare, jobs, or taxes in general but did not mention a referendum, he did not think that anyone would suggest it was not campaign related. As an example, he referred to the marriage issue that was on the ballot in 2009. He said if an MCEA candidate were to run an ad during this election regarding this matter, it would not be considered inappropriate because the issue is not on the ballot. He did not think that the analysis should change simply because an issue in the subject of the ballot question. The question to ask is whether the communication promotes a candidate's campaign as well as discussing an issue.

Mr. Billings also addressed the issue regarding candidates whose businesses are affected by the tax reform act, which is the subject of the people's veto. In particular, the business of a candidate would run an ad using the candidate's voice stating the impact of the tax reform act on his business. He would not state in the ad that he is running for office and would only focus on the negative impact that the tax reform act will

have on his business and the economy. He also raised the question whether private funds could be used for the ad, if the use of MCEA funds were considered inappropriate. He referred to a flyer by Rep. Terry Hayes, which talks about a referendum issue. Rep. Hayes was told by Commission staff she could spend her private funds on the flyer as long as it did not state she was running for election on the flyer. He stated he believes allowing the use of personal funds for this type of expenditure creates a loophole in the MCEA system. He reiterated that the Commission has taken this issue up before and therefore should consider the precedent.

Alison Smith, co-chair of Maine Citizens for Clean Elections, cautioned the Commission not deal with hypothetical issues. She said dealing with specific cases is the best procedure to follow. She said the statute is clear that public funds are for promoting a specific candidate's own campaign and not for any other purpose. She said the expenditure guidelines disallow public funds to promote or oppose ballot issues. She said the hypothetical radio ad in question could fall on either side of the law; however, the Commission's role is not to advise candidates on what they can or cannot say in communications. She said the Commission does have authority to remind candidates and reinforce the purpose of Clean Election funds as well as what is allowed under the expenditure guidelines.

Ms. Smith suggested some criteria the Commission might chose to weigh in with regard to advertising. For example, whether a candidate is in a contested race, how much of the communication relates to a ballot question as opposed to the candidate, whether there is a call to action, and if so, what is the call to action. She strongly advised against preapproval of any communications by the Commission.

She said with regard to the second question, business-related advertising, it is possible that a loophole could exist. She said that business advertising could be used to evade contribution limits and disclosure requirements. In the future, she thinks the Commission should look at business advertising by candidates more closely. She said the ad in question falls less under business advertising and more under political speech.

Mr. McKee suggested the two issues be discussed and voted upon separately. He said the second issue with regard to the radio ad by the candidate's business really has other factors that need to be taken into account, such as timing and content, for example. He said he agreed with Commissioner Marsano's view

back in 2008 that the Commission be careful about placing limits on our citizen's legislature when they need to advertise their businesses around the election. He said he would be inclined to defer a decision on this particular matter at this time and deal with a more concrete matter, such as a complaint regarding a specific ad, if it should arise at a later time.

Mr. Youngblood said the materials provided by Commission staff for guidance are very well thought out and he sees no reason to change a thing.

Mr. McKee, in the matter of Mr. Billings' question #2 requesting advice regarding a radio ad, moved that the Commission not provide an advisory opinion. Mr. Duchette seconded.

Motion passed unanimously (4-0).

Regarding Mr. Billings' first question, Mr. Duchette said he agreed with Mr. Billings' statement that candidates should be able to discuss the issues. If the issue also happens to be the subject of a ballot question, candidates are still going to want to discuss it. The question is whether they can use MCEA funds to do so or address the issues in other ways, such as letters to the editor. He said that it is important to know the exact content of the communication in order to come to a decision. In this case, the Commission has the script for the ad and he thinks that a decision can be made about this particular radio ad.

Mr. McKee said the content and timing of the ad are factors to consider. This ad is mostly about the ballot question, even though it does also promote the candidate.

Mr. Duchette stated that he was uncomfortable making a distinction between discussing an issue when it is on the ballot and discussing it when it is not on the ballot. He said he was concerned about regulating the speech of candidates by saying that they could not use clean election funds to discuss an issue because it is on the ballot. He said if the issue is important, it should not matter whether it is on the ballot and funds should be allowable in either case.

Mr. McKee said there is a specific guideline prohibiting the use of clean election funds to support or oppose ballot questions or any political or social cause, other than the candidate's campaign. He said this communication seems to fall directly within that prohibition.

Ms. Matheson said it does not seem realistic to say that because an issue is on the ballot, the issue cannot be mentioned in a campaign ad. Taxation, for example, is always going to be a controversial issue regardless of whether there is a ballot question that deals with that issue. She said if the primary focus of the ad were to talk about taxes in general and this candidate's position on taxes in general and include a minor reference to the ballot question, it may be acceptable. She said the primary purpose of this ad is less about the candidate and more about the referendum, which presents an issue of whether Clean Election funds can be used. She said a strict reading of the statute would indicate that Clean Election funds cannot be used for the ad.

Mr. Duchette said he is troubled by saying yes or no on this particular communication. He said candidates know where the line is and should use their judgment.

Mr. Youngblood said making a determination is easier after the fact. He said if a candidate talks about how he or she is voting in a campaign ad, that would be crossing the line. He said the guidance is very good and if a candidate goes by the guidance, there will not be a problem.

Mr. McKee said this particular ad could be a problem because it is more specific as to promoting a ballot issue because it states how the candidate will be voting on the ballot issue.

Mr. Duchette moved that the Commission not provide an advisory opinion regarding Mr. Billings' first request for advice. Mr. McKee seconded.

Motion passed unanimously (4-0).